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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 886

THE PORT OF NEW YORK AUTHORITY,
Appellee,

vs.

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,
Appellants.

THE PORT OF NEW YORK AUTHORITY,
Appellee,

vs.

ELM LAND CO., INC.,
Appellant.

On Appeal from Final Judgment of the Supreme Court of New Jersey

JURISDICTIONAL STATEMENT AND BRIEF FOR APPELLANTS, ELIZABETH CERVIERI, JOHN A. CERVIERI AND ELM LAND CO., INC.

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JURISDICTIONAL STATEMENT AND BRIEF FOR APPELLANTS, ELIZABETH CERVIERI, JOHN A. CERVIERI AND ELM LAND CO., INC.

Opinions of the Court Below

The majority and dissenting opinions of the New Jersey Supreme Court affirming the judgment of the New Jersey Superior Court, Law Division, are reported in 34 N. J. 144, 167 A. 2d 609 (1961). Both opinions are appended hereto.

Jurisdiction

This is an appeal brought pursuant to 28 U. S. C. A. 1257(2) which permits an appeal from a final judgment rendered by the highest court of the state in which a decision could be had "where is drawn in question the validity of a statute of any state on the ground of its being repugnant to the Constitution, treaties or laws of the United States, and the decision is in favor of its validity."

There are two cases involved in this appeal, both being taken from the Supreme Court of the State of New Jersey. They involve identical or closely related questions and, therefore, are being outlined herein in a single jurisdictional statement and brief.

The date of judgment and entry thereof in both of the within cases was January 23, 1961, and for each case a notice of appeal was filed with the Supreme Court of New Jersey on February 24, 1961.

It appears settled that a judgment of the highest court of a state against the contention of a party that a particular state statute violated the Fourteenth Amendment of the United States Constitution would entitle that party to an appeal as to the constitutional issue on its merits in accordance with said statutory provision. *Kedroff* v. *St. Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U. S. 94 (1952). To the same effect is *Winters* v. *People of State of New York*, 333 U. S. 507 (1948).

The particular statute of the State of New Jersey which has in these two cases been held valid as against both appellants' contention that it is repugnant to the Fourteenth Amendment of the United States Constitution is herein set forth from N.J.S.A. 32:1-132:

> "32:1-132. Determination by Port Authority that real property is required for public use; condemnation.
>
> "If for any of the purposes of this act (including temporary construction purposes, and the making of additions or improvements to bridges or tunnels already constructed), the Port Authority shall find it necessary or convenient to acquire any real property as herein defined, whether for immediate or future use, the Port Authority may find and determine that such property, whether a fee simple absolute or a lesser interest, is required for a public use, and upon such determination, the said property shall be and shall be deemed to be required for such public use until otherwise determined by the Port Authority; and with the exceptions hereinafter specifically noted, the said determination shall not be affected by the fact that such property has theretofore been taken for, or is then devoted to, a public use; but the public use in the hands or under the control of the Port Authority shall be deemed superior to the public use in the hands of any other person, association or corporation.
>
> "The Port Authority may acquire and is hereby authorized to acquire such property, whether a fee simple absolute or a lesser interest by condemnation or the exercise of the right of eminent domain under and pursuant to the provisions of the condemnation law of the State of New York, in the case of property located in such State, and Revised Statutes of New Jer-

sey, Title 20:1-1 et seq., in the case of property located in such State, or at the option of the Port Authority as provided in section 15 of chapter 43 of the laws of New Jersey, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, and as provided in section 15 of chapter 802 of the laws of New York, 1947, as amended, for the condemnation of real property for air terminal purposes, in the case of property located in such State, or pursuant to such other and alternate procedure as may be provided by law.

"Where a person entitled to an award in the proceedings to condemn any real property for any of the purposes of this act, remains in possession of such property after the time of vesting of title in the Port Authority, the reasonable value of his use and occupancy of such property subsequent to such time, as fixed by agreement or by the court in such proceedings or by any court of competent jurisdiction, shall be a lien against such award, subject only to liens of record at the time of the vesting of title in the Port Authority.

"Nothing herein contained shall be construed to prohibit the Port Authority from bringing any proceedings to remove a cloud on title or such other proceedings as it may, in its discretion, deem proper and necessary, or from acquiring any such property by negotiation or purchase. As amended L. 1956, c. 156, p. 632, sec. 5."

It is the foregoing statute which has been questioned and which is the subject of these cases. And more particularly it is that paragraph relating to procedure wherein the Port Authority, plaintiff appellee herein, is given the option to

proceed either by way of the Revised Statutes of New Jersey, Title 20:1-1 *et seq.* (which permits jury demand by condemning authority or land owner), or by Section 15 of Chapter 43 of the laws of New Jersey, 1947, as amended (which does not permit a jury demand on the part of the land owner).

Question Presented by the Appeal

Whether a state statute providing one party a procedural option to demand a jury while not providing such option to an adverse party is contrary to the United States Constitution in that it denies equal protection of the laws to said adverse party?

Statement of the Case

These proceedings were instituted by plaintiff-appellee, The Port of New York Authority, under *N.J.S.A.* 32:1-132 as amended *L.* 1956, c. 156, to condemn certain lands of defendants, Elizabeth M. and John A. Cervieri, husband and wife, and Elm Land Co., Inc. (as well as lands of other persons) for use in connection with its undertaking to add an additional deck to the interstate George Washington Bridge. Defendants' demand for a jury trial on the issue of compensation to be awarded for the taking was denied on the ground that under the statute referred to the method of procedure being pursued by the Authority did not provide for trial by jury. After damages had been awarded by the Law Division of the Superior Court, the Cervieris and Elm Land Co., Inc. appealed to the Appellate Division from part of the judgment, contending primarily that the option granted by the Legislature to the Authority of selecting one of two alternative procedures in condemning their property deprived them of equal protection of the law in violation of the state and federal constitutions. Before argument there the matter was certified on motion of the New Jersey Supreme Court, for its disposition.

The action to condemn defendants-appellants' property for the purpose indicated was instituted on July 28, 1958. The complaint recited that the Authority elected "pursuant to the option accorded to it" by *N.J.S.A.* 32:1-132 to proceed under the air terminal act, *N.J.S.A.* 32:1-35.15 and not under the general eminent domain act, *N.J.S.A.* 20:1-1 to 36. Immediate fee simple title and possession were demanded. An order to show cause why the relief prayed for should not be granted, returnable September 5, 1958, was issued by the Superior Court, Law Division, and served upon the various parties involved. On the return day, the Cervieris appeared without counsel and an order was entered awarding title of the several properties described in the complaint to the plaintiff, making provision for possession thereof and directing plaintiff to bring on "a hearing to have this Court either (a) determine without a jury after view of said property the compensation which should justly be made to the owner or respective owners thereof and thereafter enter a judgment in the amount so determined, or (b) in the alternative to have this Court appoint three advisory commissioners to view said real property and to advise on or before a date to be specified by the Court of the damages, if any, which should be assessed for the taking of said real property."

Pursuant to notice of motion the appellant moved to dismiss Counts 3 and 7 of the complaint on the ground that R.S. 32:1-132, as amended 1956, upon which the complaint is based, is unconstitutional. These motions were denied by the trial court. Note that the motion had been argued in connection with Count 10 and then repeated for the record on the trial of Counts 3 and 7.

Both cases were then heard, damages awarded and an appeal was taken from a final judgment of the Superior Court of New Jersey, Law Division, entered May 25, 1960,

which on Count 7 of the complaint in condemnation filed in the above entitled cause by The Port of New York Authority awards to Elizabeth M. Cervieri, the appellant, the sum of $7,100.00 and on Count 3 to said appellant the sum of $1,412.00; and an appeal was taken from a final judgment of the Superior Court of New Jersey, Law Division, entered July 6, 1960, which awards the appellant, Elm Land Co., Inc., $1,000.00 on Count 3 and $500.00 on Count 4.

The appeals were to the Appellate Division of the Superior Court of New Jersey, but, as above stated, the Supreme Court of the State of New Jersey certified both matters and judgment affirming the Law Division judgments in both cases was entered on January 23, 1961.

ARGUMENT

A state statute providing one party a procedural option to demand a jury while not providing such option to an adverse party is invalid as against the Fourteenth Amendment of the United States Constitution in that it denies equal protection of the laws to said adverse party.

New Jersey R.S. 32:1-132, as amended L. 1956, c. 156, grants to The Port of New York Authority in condemnation cases relating to additions or improvements to the George Washington Bridge an option to proceed either by way of Section 15 of Chapter 43 of the Laws of New Jersey, 1947, R.S. 32:1-35.15 (the Airport Act), or by way of R.S. 20:1-1 *et seq.* (the Eminent Domain Act). The former provision requires an assessment of compensation without a jury while the latter permits a demand for a struck jury to be filed on appeal from the Commissioners' award. R.S. 20:1-16, 20. This procedural advantage is not available to the condemnees.

Defendant-appellee, The Port of New York Authority, is a body corporate and politic created by a compact between the States of New Jersey and New York (R.S. 32:1-4) with the consent of the Congress of the United States (42 Stat. 174). It is an agency of both states to further their common interests within the jurisdiction committed to it. *Port of New York Authority* v. *Weehawken Tp.*, 27 N. J. Super. 328, 353, 99 A. 2d 377 (Ch. Div. 1953), reversed for reasons not here pertinent 14 N. J. 570, 575, 103 A. 2d 603 (1954); *County of Bergen* v. *Port of New York Authority*, 160 A. 2d 811 (Sup. Ct. 1960) [not yet officially reported].

Equal protection under the laws is granted by Article I, Section 1 of the New Jersey Constitution and by the Fourteenth Amendment of the United States Constitution. The constitutional guarantee of due process of law guarantees equality in the determination of the rights of those affected and protects the individual against arbitrary action. *Hague* v. *Warren*, 142 N. J. Eq. 257, 59 A. 2d 440 (E. & A. 1948); *National Dairy Products Co.* v. *Milk Control Board of New Jersey*, 133 N.J. L. 491, 44 A. 2d 796 (Sup. Ct., 1945).

This equality of due process and the requirement of equal protection of the laws forbids arbitrary discrimination against one party and favoring another in like circumstances. Distinctions can only be made where there is a rational basis therefor. *Washington Nat. Ins. Co.* v. *Board of Review of New Jersey Unemployment Compensation Commission*, 1 N. J. 545, 64 A. 2d 443 (Sup. Ct. 1949).

In the instant case a classification is made without any basis in fact. An option is granted to one party but denied to another where there can be no reasonable basis for such distinction as the circumstances are alike. The rights of all persons must rest on the same rule under similar circumstances. *Andrews* v. *Board of Adjustment of the Township of Ocean*, 31 N. J. Super. 69, 143 A. 2d 262, 30 N. J. 245, 152 A. 2d 580 (Sup. Ct. 1959).

In 12 Am. Jur. 241, Section 543, *Equality in Legal Proceedings—Civil*, the following language is found:

> "Generally speaking, equal protection of the laws is not denied by a course of procedure which is applied to legal proceedings in which a particular person is affected if such a course also would be applied to any other person in the state under similar circumstances and conditions.
>
> "Equal protection of the laws of a state is extended to persons within its jurisdiction, within the meaning of the Fourteenth Amendment to the Federal Constitution, when its courts are open to them on the same condition as to others in like circumstances, with like rules of evidence and modes of procedure, for the security of their persons and property, the prevention and redress of wrongs, and the enforcement of contracts. The Supreme Court at an early date recognized the rule that an act of the legislature which in terms would give to one individual certain rights and the benefit of certain modes of procedure and would deny to another similarly situated the same rights could be challenged successfully on the ground of unjust discrimination and denial of the equal protection of the laws."

In *Republic Pictures Corp. v. Kappler*, 151 Fed. 2d 543, 547 (8th Cir., Iowa 1945), aff'd 327 U. S. 757, rehearing denied 327 U. S. 817, where the state act had procedurally prescribed a shorter statute of limitations for rights arising under federal law and had thereby discriminated against such claims "• • • solely because it arises under a federal statute", the court stated that:

> "Equal protection of the law in its constitutional sense implies that all litigants similarly situated may

appeal to the courts for relief under like conditions and without discrimination."

Specifically relating to procedure in a condemnation action is *J. Backus and Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 571 (1898), where the applicable statute had changed the procedure to make appropriate a common law jury rather than the original jury of inquest. The Supreme Court held that such change could not be attacked but in discussing the problem stated that

> "An act of the legislature which in terms gave to one individual certain rights and denied to another similarly situated the same rights might be challenged on the ground of unjust discrimination and a denial of the equal protection of the laws."

So that the suggestion was that if one party could choose one kind of jury while the adverse party could choose only another kind of jury or had an option as to procedure, the legislation providing for such uneven, arbitrary and discriminatory procedure would be unconstitutional. And this of course would not be altered merely because one party was the condemning authority and the other party the property owner, as any distinction on that ground could not possibly be based upon material and substantial distinctions reasonably related to the subject matter of the legislation or considerations of policy.

As has been stated many times with respect to both the Fourteenth Amendment to the United States Constitution and the equal protection clauses of state constitutions, legislation must be declared unconstitutional where a classification is not based on reasonable ground and "arbitrary selection can never be justified by calling it classification." *Connolly v. Union Sewer Pipe Co.*, 184 U. S. 540, 560 (1902). Without doubt this language is also appropriate

where the statute involved creates a classification which makes dissimilar the procedural rights of different parties. See *Bogni* v. *Perotti*, 112 N. E. 853 (Sup. Jud. Ct. Mass. 1916), where a statute was held unconstitutional since it permitted one class to resort to injunctive relief and not another. To the same effect is *Traux* v. *Corrigan*, 257 U. S. 312 (1921).

The Port Authority has in its brief filed in the State court cited *Dohany* v. *Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930), and the majority opinion of the New Jersey Supreme Court has relied thereon. It was held there that legislation could provide a different condemnation procedure for the State itself than for a private corporation with condemnation authority. The issue, however, had nothing whatever to do with that which is involved herein; since the party adverse to the condemning authority in that case did not have any lesser privilege or procedural remedy than did the State or private condemning authority.

Also relied upon by the Port Authority previously has been *Putnam* v. *Ford*, 155 Va. 625, 155 S. E. 823 (Sup. Ct. of App., Virginia, 1930). There the State Tax Commissioner was given the right to a rehearing but not so the land owner. However, it was said that legislation could not arbitrarily classify; it being necessary that any classification rest on a ground of difference having relation to the object of the legislation so that all parties be treated alike. It was held in that action that a rationally sound classification existed since the original hearing required constructive notice only to the state tax commissioner and the rehearing was necessary to that party so as to ensure the opportunity for an appearance.

Also cited previously by the Port Authority is *United States* v. *Illinois*, 218 U. S. 532, 54 L. Ed. 1139 (1910), it being stated that said case was the basis for the decision in

the *Putnam* case mentioned in the foregoing paragraph. In *United States v. Heinze* the court wrote that:

> "The state may classify broadly the subjects of taxation, but in doing so it must proceed upon a rational basis. The state is not at liberty to resort to a classification that is palpably arbitrary. The rule is generally stated to be that the classification must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstances shall be treated alike."

It happened that the question in the *Heinze* case involved the right of the United States to appeal from a judgment sustaining a motion to quash. Of course it was a criminal case, the factual material entirely different, the policy wholly unlike that here, and certainly a basis in fact existed for the classification permitting the government a right to appeal at that point.

United States v. Burnison, 339 U. S. 87, 94 L. Ed. 675 (1950), is another case relied upon by the Port Authority in its previous briefs. A classification was made by statute but the court held "* * * it is justified by reason of the state's close relationship with its residents and their property." The issue concerned the permissibility of testamentary gifts to the State of California, but not to the United States. Again the facts are not similar to those herein and no question was there raised nor was it raised in any of the cases as to the principle that no arbitrary classification could be established by statute.

The majority opinion of the New Jersey Supreme Court delivered by Justice Francis argues that so long as each procedure provided to the Port Authority in and of itself satisfies the demands of equal protection, that both to-

gether as a unit must necessarily satisfy the requirement of equal protection embodied in the Fourteenth Amendment to the United States Constitution. This appears after analysis to be a wholly specious argument. It cannot and does not ever follow that merely because two or more ingredients are proper, that joined together their unity will be satisfactory. Clearly the Port Authority is enabled to utilize either one of the two procedures while the land owner is left to the mercy of the choice. The Port Authority is fortified by both methods and the fact each one alone is not unconstitutional cannot mean that both together, while the land owner has neither, satisfy the demands of equal protection.

The majority of the Supreme Court of New Jersey seems to sense the fallaciousness of its argument since further in its opinion it states:

> "* * * If there were inequality within the framework of either procedure, for example, if the Authority were given and the property-owner were denied a right of appeal, *In re City of Rochester* 224 N. Y. 386, 121 N. E. 102 (1918); *State* v. *Wisconsin-Minnesota Light and Power Co.*, 165 Wis. 430, 162 N. W. 433 (1917), or the right to introduce evidence of comparable sales, or offers to sell or purchase, *Georgia Power Co.* v. *Brooks*, 207 Ga. 406, 62 S. E. 2d 183 (1950), in one mode of procedure which the condemnor had the option to select and did select in the particular case, a deprivation of equal protection of law would exist. * * *"

Those words indicate cogently that if the Port Authority was given an option to choose two alternative modes of procedure and the property owner was not there would as a result be inequality within the framework of the statute.

It would seem only logical to look at the statute as a whole rather than to dismember into units; and upon so doing, the foregoing comment of the court undermines the logic of its conclusion.

As Justice Proctor has written in his dissenting opinion, joined in by Justice Schettino, no case has been cited by the majority to support the conclusion of the court, which result completely subordinates the right of equal protection under the laws to the due process clause in the Fourteenth Amendment. These are two separate and distinct rights and equal protection is certainly entitled to as much preservation as is due process.

Realizing probably that proper individual components do not make a proper whole, the majority feels it necessary to find a basis for the unequal classification. This is apparent when it says that:

> "The principle of common application is that if there be any reasonably conceivable basis for the separate treatment the legislation will not be voided."

However, the reasonable basis cannot be found. The fact that the classification is blatantly arbitrary is and can be the only conclusion. If, as the majority says, "greater expedition and quicker understanding may be expected from an experienced judge than from a jury of laymen", then the Port Authority should not have been given a choice, but should have been given recourse only to trial by judge. On the other hand, if in some instances a jury would be preferable, then the land owner should have an equal opportunity to make that determination.

The Port Authority itself has said in its brief and admitted throughout in oral argument before the Supreme Court that there is no basis or standard set out for a rational exercise of the option between jury trial or trial by judge

(see plaintiff's brief for the State court at page 18, line 3 and at page 25, line 37). This is clear acknowledgment that there is no standard for the exercise of the option; and therefore necessarily requires the conclusion that the classification is none other than arbitrary. The Port Authority dismisses this lack of standard by saying that procedural rights are not fundamental. The appellant here says that where procedural rights create unequal positions then indeed nothing could be more fundamental. Equal protection is a distinct and, of course, a fundamental constitutional guarantee.

The appellant here agrees with the reasoning of the dissenting opinion. It argues that a unilateral right to trial by jury must be invalid as against the Fourteenth Amendment. The subject statute, which grants said unilateral right, necessarily creates an arbitrary discrimination and denial of equal protection under the laws. The question presented here would therefore be so substantial as to require plenary consideration by the Supreme Court of the United States.

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[APPENDICES FOLLOW]

Appendix A

Majority Opinion of the Supreme Court of New Jersey (No. A-44, September Term—1960)

(Filed—January 23, 1961.)

SUPREME COURT OF NEW JERSEY

(No. A-44, September Term—1960)

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

MARYVONNE E. HEMING, JR., *et al.*,

Defendants,

and

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,

Defendants-Appellants.

Argued November 9, 1960. Decided January 23, 1961.

MR. RUSSELL E. WATSON argued the cause for plaintiff-respondent, The Port of New York Authority.

(MR. ROBERT S. TOBIN, of counsel.)

MR. NELSON G. GROSS argued the cause for defendants-appellants, Elizabeth M. Cervieri and John A. Cervieri. (MESSRS. GROSS AND GROSS, attorneys.)

Appendix A

The opinion of the Court was delivered by

FRANCIS, J.

These proceedings were instituted by plaintiff, The Port of New York Authority, under *N.J.S.A.* 32:1-132 as amended *L.* 1956, c. 156, to condemn certain lands of defendants, Elizabeth M. and John A. Cervieri, husband and wife, (as well as lands of other persons) for use in connection with its undertaking to add an additional deck to the interstate George Washington Bridge. Defendants' demand for a jury trial on the issue of compensation to be awarded for the taking was denied on the ground that under the statute referred to the method of procedure being pursued by the Authority did not provide for trial by jury. After damages had been awarded by the Law Division of the Superior Court, the Cervieris appealed to the Appellate Division from part of the judgment, contending primarily that the option granted by the Legislature to the Authority of selecting one of two alternative procedures in condemning their property deprived them of equal protection of the law in violation of the state and federal constitutions. Before argument there the matter was certified on our own motion for disposition by this Court.

The action to condemn defendants' property for the purpose indicated was instituted on July 28, 1958. The complaint recited that the Authority elected "pursuant to the option accorded to it" by *N.J.S.A.* 32:1-132 to proceed under the air terminal act, *N.J.S.A.* 32:1-35.15 and not under the general eminent domain act, *N.J.S.A.* 20:1-1 to 36. Immediate fee simple title and possession were demanded. An order to show cause why the relief prayed for should not be granted, returnable September 5, 1958, was issued by the Superior Court, Law Division, and served upon the various parties involved. On the return day, the

Cervieris appeared without counsel and an order was entered awarding title of the several properties described in the complaint to the plaintiff, making provision for possession thereof and directing plaintiff to bring on "a hearing to have this Court either (a) determine *without a jury* after view of said property the compensation which should justly be made to the owner or respective owners thereof and thereafter enter a judgment in the amount so determined, or (b) in the alternative to have this Court appoint three advisory commissioners to view said real property and to advise on or before a date to be specified by the Court of the damages, if any, which should be assessed for the taking of said real property." (Emphasis added.)

Some time prior to the hearing to fix the damages these defendants served and filed a notice that they would apply at the hearing for a trial by jury. The motion was made and denied because the Authority had elected to condemn in accordance with the procedure prescribed by the airport terminal law which gave neither party to the action a right to trial by jury. The matter was then heard, damages were awarded, and this appeal followed.

The Authority has moved to dismiss the appeal, contending that the demand for jury trial and the attack upon the constitutionality of the election bestowed upon it with respect thereto, should have been made immediately after the service of the complaint and order to show cause upon the defendants. The claim is that since title and possession had vested in it within six weeks after defendants were served, their jury demand about a year and a half later came too late. But defendants disclaim any effort or intention to interfere with the transfer of title or possession. The request for a jury was pertinent only to the issue of damages and was made only as to that aspect of the case. Furthermore, reversal of the judgment would not divest

the title. *N.J.S.A.* 32:1-35.15(*l*). Under the circumstances lapse of time does not foreclose consideration of the problem. Accordingly, the motion to dismiss is denied.

Study of the merits of the appeal requires reference to various clauses of the Constitutions and to a number of informative statutes.

Acquisition of property for public use by the state, county, municipality, or a public agency is generally controlled by the eminent domain act, *N.J.S.A.* 20:1-1 to 36. But for a few changes that act traces back substantially in its present from to *L.* 1900, c. 53. When property is desired for public use and the parties cannot agree upon the price, the value is required to be ascertained in the manner directed thereby "except as otherwise provided by law". *N.J.S.A.* 20:1-1. Provision is made for the appointment by the Superior Court of three commissioners to fix the compensation to be paid. When they have done so in the manner prescribed and filed their report with the court, either the public body or the land owner may appeal therefrom. *N.J.S.A.* 20:1-2 to 16. Such appeal must be tried in the Superior Court "by a jury upon the demand of any party" thereto. *N.J.S.A.* 20:1-20. After the advent of the 1947 Constitution this Court in 1953 implemented the general act through its Rules of Civil Practice. *R.R.* 4:92-1 to 13. Provision was made for jury trial on appeal from the award of commissioners on demand of any party. *R.R.* 4:92-6.

The Port of New York Authority is a public corporate entity, an arm of the States of New York and New Jersey, created in 1921 by compact between them for the purpose of coordination and development of the terminal, transportation and other facilities of commerce in, about and through the port of New York. *N.J.S.A.* 32:1-1. It was given the power of condemnation by *N.J.S.A.* 32:1-33, and by *N.J.S.A.* 20:1-1 to 33 a legislative mandate was im-

posed to exercise the power according to the procedure prescribed by the eminent domain act, *supra*. Moreover, by specific reference the same procedure was made applicable to property to be condemned for the Bayonne Bridge, the Outerbridge Crossing, and construction of the Goethals Bridge. *L.* 1925, c. 95, *N.J.S.A.* 32:1-100; *L.* 1925, c. 193, *N.J.S.A.* 32:1-47; *L.* 1925, c. 195, *N.J.S.A.* 32:1-59. In addition, and more pertinent to the present case, construction of the George Washington Bridge was authorized by *L.* 1925, c. 41, *N.J.S.A.* 32:1-71. Section 7 of the act also required any condemnation proceedings necessary to the accomplishment of that end to be brought under the eminent domain act.

Chapter 4, *L.* 1931, among other things legislated with regard to the acquisition by condemnation of any real property that might be necessary for the construction of bridges or tunnels or for the making of additions or improvements to bridges or tunnels already in existence. *Section* 15; *N.J.S.A.* 32:1-132. Authorization was given to secure such property by use of the eminent domain act.

In 1947 the Authority was empowered to acquire property by condemnation for air terminal purposes. *L.* 1947, c. 43, *N.J.S.A.* 32:1-35.15. The act provides its own procedure to be employed in so doing. Upon the filing in the Superior Court of a complaint seeking condemnation and after compliance with certain formalities as to notice, and the like, an application must be made to the appropriate judge to fix a date for hearing on the compensation to be paid. The matter is then heard by a judge who shall determine "without a jury and with or without a view of the property" the issue of valuation. *N.J.S.A.* 32:1-35.15(*i*). He may appoint three commissioners to view the lands and "advise" him what damages, if any, shall be awarded. If appointed:

> "The commissioners shall proceed under such directions and rules as shall from time to time be fixed by the said judge to view the lands, to hear such evidence as they may desire, and to fix ~~such sum~~, if any, that in their judgment will represent the fair value of the lands so taken. * * *." *N.J.S.A.* 32:1-35.17*a*.

The judge is not bound by the commissioners' findings. He may review them and alter or reject them in such manner as will fairly protect the interests of the parties, and his "review may be made either with or without further hearing." *Ibid.* After the judge has ascertained the compensation to be paid, judgment in that amount is to be entered. Any party aggrieved by the judgment "may appeal". *Sections* 15*f-l*, as amended *L.* 1953, c. 31, *N.J.S.A.* 32:1-35.15*f-l*. Such an appeal would be heard in the Appellate Division.

Section 15 of the 1931 act, *N.J.S.A.* 32:1-132, relating as has been indicated above, to the construction of and to the making of additions or improvements to existing bridges and tunnels, and the acquisition of any necessary land therefor by means of the procedure established by the eminent domain act, was amended by *L.* 1956, c. 156. The amendment is the cause of the present controversy. It did not repeal the direction to proceed in condemnation under the eminent domain act but it granted to the Authority the "option" to pursue that statute or the procedure created by the air terminal act, *supra*. More specifically, the amendment authorized the Authority to condemn pursuant to "Revised Statutes of New Jersey, Title 20:1-1 *et seq.* in the case of property located in [New Jersey], or at the option of the Port Authority as provided in section 15 of chapter 43 of the laws of New Jersey, 1947, as amended for the condemnation of real property for air terminal purposes * * *." *N.J.S.A.* 32:1-132.

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As the result of the 1956 amendment, therefore, the Legislature, presumably having in mind the provision of *Section* 1 of the eminent domain act, *N.J.S.A.* 20:1-1, that it shall control the exercise of the power of eminent domain "except as otherwise provided by law", made available two procedural mechanisms for condemnation cases. Thus, if the Authority decided to proceed under the eminent domain act commissioners would be appointed to value the property. If the parties were satisfied with the award, that would end the matter. If, however, either was dissatisfied, an appeal to the Law Division of the Superior Court could be taken and a trial de novo had with or without a jury, at the option of either party. Or if the Authority elected to proceed under the airport terminal act, the matter could be heard expeditiously by the Law Division (with or without preliminary appointment of advisory commissioners) and any damages arising from the taking ascertained. When the latter course is followed, neither party can demand trial by jury. In the present instance, the Authority having chosen to take defendants' land under the air terminal act, trial by jury of the issue of damages was not open to either litigant.

The first question to engage our attention arises from defendants' contention that the option clause of the 1956 amendment of *Section* 15 transgresses *Article* IV, *Section* 7, paragraph 5, of the New Jersey Constitution because it incorporates therein by reference only the condemnation procedure formula of the air terminal act. The claim is that since the Constitution provides that "No act shall be passed which shall provide that any existing law, or any part thereof, shall be made or deemed a part of the act or which shall enact that any existing law, or any part thereof, shall be applicable, except by inserting it in such act", the failure to set out the pertinent sections of the air termi

nal act at length in the amendment invalidates it. The law has long been settled to the contrary with respect to enactments like this one. A statute which incorporates a prior act by reference in order to create some substantive right or duty offends against the Article. But one which adopts by reference only the method of procedure necessary to effectuate its purposes is not prohibited. *Anthony* v. *Rea*, 22 N. J. Super. 452, 456 (App. Div. 1952); *Jersey City* v. *Martin*, 127 N. J. L. 18, 23 (E. & A. 1940); *Hatches* v. *Hoboken*, 82 N. J. L. 140, 142 (Sup. Ct. 1911); *Campbell* v. *Board of Pharmacy of New Jersey*, 45 N. J. L. 241, 244-45 (Sup. Ct. 1883), *aff'd* 47 N. J. L. 347 (E. & A. 1885); 6 *Nichols, Eminent Domain*, 24.2[1], p. 21 (3d Ed. 1953); 1 *Sutherland, Statutory Construction*, 1925 (3d Ed. 1943).

The crucial issue is projected by defendants' assertion that the option clause of the 1956 amendment deprives them of equal protection of the law in violation of the *14th Amendment* of the United States Constitution and *Article* I, paragraph 1, of the New Jersey Constitution. More particularly, they point out that under the eminent domain act if either they or the Authority are dissatisfied with an award of commissioners, the party dissatisfied is entitled, upon making of such an election, to appeal to the Law Division and to have the damages "determined by a jury". But since the 1956 amendment confers on the Authority the right to proceed under either the eminent domain act or the airport terminal act, and thus to eliminate the possibility of appeal to the Law Division and trial by jury for itself and the property owner, they insist that they are subjected to unfair discrimination. They do not say that the procedure itself for the ascertainment of just compensation for the land taken as prescribed by either act standing alone denies due process, *i.e.*, notice and fair hearing. And they recognize that there is no constitutional

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right to trial by jury in condemnation cases. 1 *Nichols, op. cit. supra*, 4.105[1]; 1 *Orgel, Valuation Under Eminent Domain*, 54 (2d Ed. 1953); 18 *Am. Jur. Eminent Domain*, §337, p. 979.

The right of eminent domain is an offspring of political necessity and is an integral facet of sovereignty. *Bauman v. Ross*, 167 U. S. 548, 42 L. Ed. 270 (1897); *Raun v. Housing Authority at Newark*, 125 N. J. L. 25 (Sup. Ct. 1940). Since the power of the State or of any agency created to perform some of its governmental functions to take property for public use is such a basic one, every man must be considered as holding his land subject to its exercise. *Todd v. Austin*, 34 Conn. 78 (1867). No one can complain of injustice arising out of use of it against him so long as it is lawfully employed within existing constitutional limitations. *Jahr*, Eminent Domain 3 (1951); 1 *Nichols, op. cit. supra*, 1.11[2]. An important qualification appearing in the New Jersey Constitution, *Article* 1, paragraph 20, and *Article* 4, *Section* 6, paragraph 3, as well as in the organic charter of most states, is that no private property may be taken for public use without just compensation.

In the absence of any constitutional mandate to the contrary, establishment and regulation of the manner and method of exercising the power of eminent domain has long been recognized as a prerogative of the Legislature, subject only to the due process clauses of the federal and local constitutions. *Crane v. Hahlo*, 258 U. S. 142, 66 L. Ed. 511 (1922); *A. Backus, Jr. & Sons v. Fort Street Union Depot Co.*, 169 U. S. 557, 42 L. Ed. 853 (1898); *United States v. Jones*, 109 U. S. 513, 27 L. Ed. 1015 (1883); *Morris Mon Realty Corp. v. Board, etc. County of Monmouth*, 18 N. J. 269, 275 (1955); *Marin Municipal Water Dist. v. North Coast Realty Co.*, 178 Cal. 308, 173 Pac. 469 (1918); *Jahr, op. cit. supra*, 185; 18 *Am. Jur. Eminent Domain*,

§308. The legislative discretion as to the procedure to be followed within that framework is very broad. *Secombe v. Milwaukee & St. Paul Ry.*, 90 U. S. 67, 23 Wall. 108 (1874). No particular form or mode of action is required. All that is essential is that in some appropriate way, before some properly constituted tribunal, inquiry shall be made, on notice, as to the amount of compensation to be paid for the property taken, and when that has been provided the command of due process has been met. *A. Backus, Jr. & Sons v. Fort Street Union Depot Co., supra*, at 569; *State v. Fisher*, 54 N. J. Super. 274, 281 (App. Div. 1959); *Ryan v. Housing Authority of Newark, supra* at 341-42; *Jahr, op. cit. supra*, 185. And where that appears the courts properly defer to the legislative will. *Morris May Realty Corp. v. Board, etc., County of Monmouth, supra.* There is practically universal agreement that trial by jury is not necessary. 1 *Nichols, op. cit. supra*, 4.105; 1 *Orgel, op. cit. supra*, 54; 18 *Am. Jur., Eminent Domain*, §337, p. 979. The proceeding for ascertainment of compensation as a condition to the taking may be prosecuted before commissioners, or special boards, or the courts, with or without the intervention of a jury, as the Legislature may designate. Due process is satisfied if it is conducted in some fair and just manner, with opportunity to the owner of the property to present evidence and to be heard thereon. *Dohany v. Rogers*, 281 U. S. 362, 74 L. Ed. 904 (1930); *Crane v. Hahlo, supra* at 147; *United States v. Jones, supra* at 519; *Sawyer Lumber Co. v. North Carolina Park Commission*, 30 F. 2d 121 (W. D. N. C., Three Judge Ct. 1929), *app. dis.* 280 U. S. 615, 74 L. Ed. 656 (1929); *Morris v. Comptroller*, 54 N. J. L. 268, 272 (Sup. Ct. 1892). Moreover, there is no vested right in any statutory *modus operandi*. The United States Supreme Court has said that "each succeeding legislature may establish a different one,

providing only that in each is preserved the essential elements of protection." *A. Backus, Jr. & Sons* v. *Fort Street Union Depot Co.*, *supra* at 570.

These general observations bring us within range of the specific problem presented. May the Legislature establish alternative procedures for condemnation either of which may be resorted to at the election of the State or one of its public entities? We have no doubt that it may be done constitutionally provided each procedure in and of itself satisfies the demands of due process and equal protection.

Methods of determining the damages to be paid are numerous throughout the country. General, special and alternate procedures abound in the various states. *Jahr, op. cit. supra*, 186; 6 *Nichols, op. cit. supra*, §24.1; 29 C. J. S. *Eminent Domain*, §214*d*. As Orgel said: "The mode of procedure in condemnation cases in the United States is wholly a creature of statute and the legislatures have not been sparing of their progeny." 1 *Orgel, op. cit. supra*, 8. On the national scene until the adoption of Rule 71A of the Rules of Civil Procedure in 1951, the federal courts were required to conform to state practice in eminent domain actions. 7 *Moore's Federal Practice*, §71a.03 (2d ed. 1955). Divergent practices among the states and within the same state led the Federal Advisory Committee on rules to the belief that uniform procedure in the federal system was desirable. In the general statement accompanying the 1948 draft of Rule 71A it was suggested that as far back as 1931 in the various states there were 269 different methods of judicial procedure in various classes of condemnation cases and 56 methods of non-judicial or administrative procedure. *Moore, op. cit. supra*, at 2739. In *Clinton School District* v. *Starr Commonwealth For Boys*, 322 Mich. 105, 33 N. W. 2d 805, 809 (1948), the Supreme Court of Michigan, speaking on the subject of multiple and optional procedures, said:

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"In the report of the Judicial Council of Michigan, January 1931, a careful study was made of seventeen different methods provided for by which various State agencies could exercise the right of eminent domain. Some of the methods apply only to certain agencies, while others apply to many agencies. Criticism has frequently been leveled at this system because of the confusion which it causes, but the recommendation of the Judicial Council of a single method was never submitted as a Constitutional amendment. Alternative methods are still left open to certain public agencies. That pursued by plaintiff is proper and is not in any way affected by the fact that plaintiff might have pursued a different method."

Out of the Federal Committee study came Rule 71A. Although substantial uniformity for condemnation actions was achieved thereby, certain qualifications were added. In short, under Rule 71A(*k*) if Congress has created or creates any special tribunal to hear certain cases arising out of the exercise of the federal power of eminent domain, that procedure must be followed. Otherwise any party may have a jury trial on demand, unless the trial court in its discretion orders that "because of the character, location, or quality or quantity of the property to be condemned, or for other reasons in the interest of justice, the issue of compensation shall be determined by a commission of three persons appointed by it." *Federal Rules of Civil Procedure* 71A. Nichols notes that Congress has specially constituted a tribunal for trial of such cases in instances of expropriation by the Tennessee Valley Authority Act and in the District of Columbia. 6 *Nichols, op. cit. supra*, p. 334.

The Tennessee Valley Authority Act does not grant trial by jury. 16 *U.S.C.A.* 831*v*. The procedure established,

i.e., original determination of compensation by commissioners, and review in the District Court without a jury, is constitutional. *Welch* v. *Tennessee Valley Authority*, 108 F. 2d 95 (6th Cir. 1939), *cert. den. United States* v. *Welch*, 309 U. S. 688, 84 L. Ed. 1030 (1940). The *modus operandi* was said to be appropriate to the nature of the case and in "no way contrary to the Fifth Amendment." The Circuit Court of Appeals declared that: "[T]he State may also, when providing for its own needs under the right of eminent domain and taking for such purpose the property of individuals, give all necessary protection to its agents and relegate the owner to such remedy as it deems proper, provided it is adequate and accords to the citizen due process, and without any reference to the Seventh Amendment." 108 *F. 2d* 99; and see *United States* v. *Puryear*, 105 F. Supp. 534 (W. D. Ky. 1952).

When alternative methods of condemnation are prescribed by the Legislature, in one of which either party at some stage of the action may obtain a jury trial, and in the other neither has such trial, and the "option" to select the course to be followed is expressly given to the public agency, the instinctive first reaction is that the unilateral choice is unfair. But we must be mindful that the State or an arm thereof has the authority to condemn property for public use. It alone institutes the proceedings (except perhaps in those rare instances when the citizen employs mandamus to compel their institution, if that can be said to constitute institution of the action). If alternative procedures existed the agency would make the choice as to which to pursue, even if the words "at the option of" were not present.

Thus, since there is no constitutional right to trial by jury, the test of validity is not whether alternative procedures are established to be used at the election of the public entity but (1) whether the objective of each one is

to achieve just compensation for the taking and whether each one, in and of itself, satisfies the demands of due process, *i.e.*, notice and fair hearing before an impartial tribunal competent to reach a just result, and (2) whether the public agency may be classified so as to warrant the separate legislative treatment.

It is obvious in this instance that the proceeding prescribed for arriving at just compensation under the eminent domain act or under the airport terminal act is sufficient unto itself as a due process mechanism. Each one is designed to produce and is capable of producing a just result. No one suggests to the contrary. If there were inequality within the framework of either procedure, for example, if the Authority were given and the property owner were denied a right of appeal, *In re City of Rochester*, 224 N. Y. 386, 121 N. E. 102 (1918); *State* v. *Wisconsin-Minnesota Light and Power Co.*, 165 Wis. 430, 162 N. W. 433 (1917), or the right to introduce evidence of comparable sales, or offers to sell or purchase, *Georgia Power Co.* v. *Brooks*, 207 Ga. 406, 62 S. E. 2d 183 (1950), in one mode of procedure which the condemnor had the option to select and did select in the particular case, a deprivation of equal protection of law would exist. But so long as each party to the litigation is accorded evenhanded treatment legislatively within each procedural technique, the fact that the Authority (assuming a valid basis for separate treatment) has the choice of one of two equally constitutional alternatives does not make the grant of the choice unconstitutional. Property owners are not deprived thereby of substantial equality in the adjudication of their rights; no matter of essential justice or fundamental right is affected. See *Marin Municipal Water Dist.* v. *North Coast Water Co.*, *supra* at 472; *Manchester Housing Authority* v. *Fisk*, 102 N. H. 280, 155 A. 2d 186, 189 (1959). In this connection a comment

of the Chancellor in *Scudder* v. *Trenton Delaware Fe Co.*, 1 N. J. Eq. 694, 721-22 (1832), in denying that trial by jury was required in eminent domain actions, is worthy of mention:

> "There is no reason why three indifferent men, selected by the chief justice from the body of the state, for their probity and independence, should not, in a mere matter of valuation, exercise as just a judgment, and be in all things as discreet and impartial, as a jury of the vicinage."

In the ultimate the conclusion to be drawn from the cases and texts is that establishment of various as well as alternate methods of procedure for the valuation of property being expropriated is a matter of legislative discretion. Where election of one of two modes is given to a public condemnor (which may be classified specially) the choice is valid so long as the remedies provided are equal from a due process standpoint. The wisdom of the legislative act is not a matter for the judicial branch of the government. *Cf. United States* v. *Alexander*, 47 F. Supp. 900, 912 (W. D. Va. 1942).

As has already been indicated, many cases are to be found wherein the right of a public agency to elect to proceed under one or the other of two legislatively created procedures has been recognized as valid. The fact that material differences existed in the two forms of procedure did not alter the result. Constitutional requirements were deemed satisfied so long as each method fairly provided for the achievement of just compensation. *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (2d Cir. 1942), *cert. den.* 317 U. S. 698, 87 L. Ed. 558 (1943); *United States* v. *Alexander*, *supra*; *United States* v. *Certain Lands*, 43 F. Supp. 578 (E. D. N. Y. 1942); *Lybrand* v. *Forman*, 259 Ala.

354, 67 So. 2d 4 (1953); *City of Oakland* v. *Parker*, —— Cal. ——, 237 P. 69 (D. C. of App. 1924); *Eed* v. *City of Utica*, 103 Kan. 567, 175 Pac. 635 (1918); *In re Gallagher Ave. in City of Hamtramck*, 300 Mich. 309, 1 N. W. 2d 553 (1942); *Muskingum Watershed Conservancy Dist.* v. *Funk*, 132 Ohio St. 593, 9 N. E. 2d 512 (1937); *Town of Cookeville* v. *Farley*, 171 Tenn. 2[illegible] 102 S. W. 2d 56 (1937); *City of Chattanooga* v. *State*, 151 Tenn. 691, 272 S. W. 432 (1925); *Doughty* v. *De Fee*, —— Tex. ——, 152 S. W. 2d 404 (1941); *Ewing* v. *Board of Sup'rs of Nelson County*, 131 Va. 471, 109 S. E. 474 (1921); *Board of Sup'rs* v. *Proffit*, 129 Va. 9, 105 S. E. 666 (1921); *State* v. *Circuit Court*, 189 Wis. 265, 207 N. W. 252 (1926). In the two New York cases, *United States* v. *Certain Lands*, *supra*, and *United States* v. *243.22 Acres of Land*, *supra*, the Federal District Courts were concerned with *Article* I, §7, of the New York Constitution which provides that compensation for private property taken for public use "shall be ascertained by a jury, or by the supreme court without a jury, but not by a referee other than an official referee, or not by less than three commissioners, appointed by a court of record as may be prescribed by law." Both courts recognized the right of the State to select any one of the methods outlined so long as it provided a fair and reasonable avenue to just compensation. There was no suggestion that selection by the State of commissioners rather than jurors to ascertain damages, denied the 14th Amendment's guaranty of equal protection to the property owner.

Pacific Telephone & Telegraph Co. v. *Eshleman*, 166 Cal. 640, 137 Pac. 1119 (1913), dealt with a somewhat analogous situation. The Constitution of California provided for trial by jury in eminent domain cases. It also created the Railroad Commission, gave it jurisdiction over utilities as well as the authority to hear, determine and fix com-

pensation without jury intervention in condemnation cases involving utilities. In the cited case it was argued that such practice was violative of the 14th Amendment of the Federal Constitution since it deprived utilities of the trial by jury that was given to all other persons whose property was taken for public use. The contention was overruled, the Supreme Court saying:

> "The requirement of a jury and of a prepayment of damages is not a part of the federal Constitution, nor of that of many of our states. It is in those jurisdictions quite a common practice to create boards and commissions to exercise the power on behalf of the state, and to make awards between litigants. It is certainly true that in the vast modern development of public utilities in their multifarious activities, in their complicated interrelations, where a taking of property is involved, a great saving of time, and a more just award may be expected from a learned, skilled, and dispassionate tribunal such as the Railroad Commission than can ever be hoped for them the haphazard verdicts of juries. And very good reasons therefore appear why, for the benefit of the state as well as for the benefit of the public service companies, awards as to the latter should be made by this body, and not by a jury. It is therefore concluded that no violence is done to the rights of petitioner under the Constitution of the United States by this proviso of the state Constitution authorizing the Railroad Commission to exercise the power of eminent domain and assess damages for a taking of property." 137 *Pac.* at 1137.

See also, *Kennebec Water Dist.* v. *City of Waterville*, 96 Me. 234, 52 Atl. 774 (1902).

The remaining question is whether the Port Authority

may be specially classified for purposes of eminent domain proceedings. We have no doubt that it may be so treated. Nichols properly observes that the rule of equal protection applies fully in the framework of a specific mechanism for ascertaining value within a particular class of condemnors. But the operation of that guaranty does not demand that the procedure to condemn by the variant classes of condemnors be the same. The action may be classified and adapted to the peculiar conditions and problems inherent in the character of the condemnation. 1 *Nichols, op. cit. supra* §4.15[2]. The principle of common application is that if there be any reasonably conceivable basis for the separate treatment the legislation will not be voided. *Robson* v. *Rodriquez*, 26 N. J. 517, 524 (1958). So far as eminent domain proceedings are concerned, the equal protection clause does not contain a mandate for exact uniformity of procedure. The Legislature may classify litigation and adopt one type of procedure for one class and a different type for another. *Dohany* v. *Rogers, supra.* In the *Dohany* case the United States Supreme Court accepted the fact that eminent domain proceedings were being conducted by the State Highway Commissioner on behalf of the State as in itself a valid basis for the exercise of legislative judgment to provide a different procedure from that prescribed for the exercise of condemnation by a private corporation. 281 *U. S.* at 369. Certainly separate classification in the case of such an important arm of the sovereign states of New Jersey and New York as the Authority should not present a more formidable constitutional obstacle. (Here it may be noted that the New York legislation contains no grant of jury trial in Authority condemnation cases in that state. And in the air terminal act the Authority is given the option of utilizing the special procedure set forth therein or that pre-

scribed by the general condemnation law. *N.Y.L.* 1947, c. 882, § 5; 12 *Consolidated Laws Service*, c. 16?, §15; *L.* 1920, c. 923 as amended; 2 *Consolidated Laws Service, Condemnation Law*, § 1, *et seq.*).

There are other realistically conceivable reasons for special treatment for the Authority in this field. In the laying out and construction of bridges and tunnels and their extensive approaches in the Hudson River waterfront area, many large and small lots and tracts of land of various kinds, vacant, residential, business and industrial, would be required. Complex problems of administration and valuation would be met. Moreover, the choice of locale for construction is limited to the Port vicinity at points on opposite sides of the River, making coordination necessary in the expropriation proceedings. The principle that a straight line is the shortest distance between two points presumably cannot be ignored. Accordingly, we believe sufficient factors are present to support the legislative judgment that the Authority should be classified separately for eminent domain procedure purposes. More particularly, in the light of the whole problem, establishment of the alternative modes of proceeding and in giving the Authority the option of selecting the one to be followed cannot be regarded as being without any reasonable justification. Manifestly, where many types and sizes of properties are being taken and the problems arising therefrom are complex, greater expedition and quicker understanding may be expected from an experienced judge than from a jury of laymen. In the present undertaking of the Authority, which concerns only the construction of an additional deck on the George Washington Bridge so that a substantial part of the existing approaches may be utilized, 40 tracts were the subject of this one action. And undoubtedly those parcels represent only a part of the total acquisition neces-

sary. In such a context the language of the Federal District Court in *Via v. State Commission on Conservation, etc.*, 9 F. Supp. 556, 563 (W. D. Va. 1935), *aff'd* 296 U. S. 549, 84 L. Ed. 388 (1935), is pertinent:

> "If, because of the large number of tracts of land involved or for other reasons, the general statute was believed to be impracticable or awkward of operation, the Legislature had an undoubted right to provide for condemnation by a procedure more conveniently fitted to the nature of the proceedings; provided, of course, that the new statute in itself was not invalid. And the mere fact that its provisions varied from those of the general statute did not render it invalid."

That statement represents generally the basis for the special non-jury proceedings incorporated in the Tennessee Valley Authority Act. In fact, it seems to provide in large measure the reasons which impel the various Federal District Courts to eliminate jury trials on application under Rule 71A. See *United States v. Delaware, Lackawanna & W. R.R.*, 264 F. 2d 112 (3rd Cir. 1959), *cert. den.* 361 U. S. 819, 4 L. Ed. 2d 65 (1959); *United States v. Buhler*, 254 F. 2d 876 (5th Cir. 1958); *United States v. 2792.82 Acres of Land*, 114 F. Supp. 76 (E. D. S. C. 1953). And in our judgment the same factors may well have influenced our Legislature in enacting the amendment with which we are concerned here. Whether the course adopted in the federal domain, which lodges in the judiciary the authority to decide if jury trial should be had, is better or wiser is not a matter for judicial determination under the circumstances of this case. The wisdom of granting to the Authority the choice of the particular procedures involved here must be argued before the legislative tribunal.

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Naturally, it is implicit in the grant that the option will be used reasonably by the Authority. In connection with the accomplishment of a project such as the one under discussion, an election to acquire *one* tract by the general eminent domain proceeding, with its trial by jury an appeal from the award of commissioners, and *the next one* by the air terminal act procedure, could find no justification in the 1956 amendment to *N.J.S.A.* 32:1-132. In such situations, except for some unique circumstance associated with a particular transaction, an election of procedure once made must control condemnation proceedings for the entire project.

In conclusion, it may be said that the clauses of the federal and state constitutions on which defendants rely do not prohibit a state from establishing different rules of procedure in eminent-domain cases for different classes of cases or of litigants, provided the variations relate merely to matters of procedure, and do not operate to deprive any property owner of substantial equality in the adjudication of his rights. So long as the Legislature provides a fair and equitable inquiry, in which the parties interested are allowed to be heard and present evidence, and are protected in their right to have just compensation, they are not deprived of the equal protection of the law because other classes of cases have been provided with a different method or a different tribunal for accomplishing the same result. See *Marin Municipal Water Dist. v. North Coast Water Co., supra; Pacific Telephone & Telegraph Co. v. Eshleman, supra; Kennebec Water Dist. v. City of Waterville, supra; Manchester Housing Authority v. Fisk, supra.*

Accordingly, the judgment is affirmed.

Appendix B

Dissenting Opinion of the Supreme Court of New Jersey (No. A-44, September Term—1960)

(Filed—January 23, 1961)

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

MARYVONNE E. HEMINO, JR., et al.,

Defendants,

and

ELIZABETH M. CERVIERI and JOHN A. CERVIERI,

Defendants-Appellants.

PROCTOR, J. (Dissenting)

With today's decision, The Port of New York Authority becomes the only litigant in the State of New Jersey with the exclusive right in condemnation proceedings to determine whether trial shall be by jury. I must dissent, because I think that *N.J.S.A.* 32:1-132, insofar as it confers that exclusive right on the Authority violates the Fourteenth Amendment to the Federal Constitution. For the purpose of analyzing the issue raised by this appeal it is essential to distinguish between the rights inherent in the concept of due process and the concept of equal protection of the law. The majority devotes considerable

effort to demonstrate that due process is satisfied if the property owner is afforded reasonable notice and the opportunity to have his case heard by an impartial tribunal. They also emphasize that, in the context of determining just compensation for condemned property, due process does not require a jury trial. I agree with both propositions. But the appellants in this case have never argued that N.J.S.A. 32:1-132 deprives them of due process. Their assertion is that they have been denied equal protection of the law in that the Authority is given the right to elect trial by jury while they are not. Equal protection is a distinct constitutional guarantee which in effect provides that lawmakers must afford to all persons within a class equality of treatment, even though such persons also enjoy the protections of due process. *Truax v. Corrigan*, 257 U. S. 312, 42 S. Ct. 124, 66 L. Ed. 254 (1921). It also requires that any legislative classification of persons be reasonably related to a recognized objective of government. *Washington National Ins. Co. v. Board of Review*, 1 N. J. 545 (1949).

Is a property owner afforded equality of treatment, within the meaning of the above-outlined principles, when the Authority as opposing party litigant *alone* has the right to decide whether trial shall be by jury? Otherwise stated, is there something so peculiar about the status of the Authority as a litigant that it may justifiably be put in a class apart from condemnee-litigants and be afforded the important advantage of selecting what tribunal shall decide the amount of just compensation? I don't think so. The majority, in an exhaustive opinion, has not cited a single case where a public agency is given a similar option and I know of none. Furthermore, I do not believe that the cases which are cited are apposite to the issue before us for decision.

Appendix B

The majority relies in part, for example, on cases which sustain condemnation procedures prescribed by the Tennessee Valley Authority Act. *Welch v. Tennessee Valley Authority*, 108 F. 2d 95 (6th Cir. 1939), *cert. denied United States v. Welch*, 309 U. S. 688, 84 L. Ed. 1030 (1940); *United States v. Parmar*, 105 F. Supp. 534 (W.D.Ky. 1952). But these merely hold that different classes of condemnors need not follow the same condemnation procedures. Whereas condemnors are ordinarily entitled under Rule 71A of the Federal Rules of Civil Procedure to a jury determination of compensation, the T.V.A. must have that issue determined without a jury. I have no doubt that the T.V.A. as a condemnor is in a class which may be reasonably differentiated from other condemnors, but the fact here pertinent is that when the T.V.A. condemns property *neither* it *nor* the condemnee-litigant may choose to have a trial by jury. Under the statute both are afforded equality of treatment since neither can avoid the requirement of having compensation determined without a jury. *Pacific Telephone & Telegraph Co. v. Eshleman*, 166 Cal. 640, 137 Pac. 1119 (1913), also relied on by the majority, is simply the reverse side of the coin. There it was held that the equal protection clause does not require the same condemnation procedures to be applied to different classes of condemnees. The Constitution of California which provides for trial by jury in general eminent domain proceedings also provided that when utility land was taken compensation would be fixed by the Railroad Commission without a jury. I have no doubt that utilities may reasonably be differentiated as a class from other condemnees for purposes of deciding which are entitled to a jury trial on compensation, but again the fact here pertinent is that when utility land is condemned *neither* the condemnor *nor* condemnee-utility may choose

to have compensation determined by a jury. Both are confined to a determination by the Railroad Commission alone.

Furthermore, I do not see how any of the cases cited by the majority for the proposition that a public agency may elect to proceed under one or another of several legislatively-created procedures is authority for the issue before us. Only the New Hampshire and the two New York cases concerned alternative condemnation procedures for determining compensation, at least one of which included trial by jury. *Manchester Housing Authority* v. *Fisk*, 102 N.H. 280, 155 A. 2d 186 (1959); *United States* v. *243.22 Acres of Land*, 129 F. 2d 678 (2d Cir. 1942), *cert. denied*, 317 U. S. 698, 87 L. Ed. 558 (1943); *United States* v. *Certain Lands*, 43 F. Supp. 558 (E.D.N.Y. 1942). *Manchester Housing Authority* v. *Fisk*, *supra*, is the closest to the present case, but not helpful to a resolution of the issue before us. There it was held that a condemning agency could proceed under one of several statutes which provided different procedures for the assessment of compensation without violating due process. I agree that the demands of due process were satisfied in that case. But that is not the issue before this court. The condemnee in *Manchester* evidently did not argue that he was denied equal protection of the law and the court nowhere considered his rights under that constitutional provision. Involved in the two New York cases was the provision of the New York Constitution that compensation for private property taken for public use "shall be ascertained by a jury, or by the Supreme Court without a jury. . . ." It is true, as the majority states, that "Both courts recognized the right of the State to select any one of the modes outlined so long as it provided a fair and reasonable avenue to just compensation." But it was the

judiciary, not the condemning agency, which selected the appropriate method for trial in those cases. This distinction is vital to a determination of whether the condemnees were afforded equal protection of the law. The trial judge, as an impartial decision-maker, could choose that procedure which he regarded as best adapted to a determination of just compensation, unmotivated by the litigious interest which might affect the condemning agency as party-plaintiff. A similar procedure is followed under Rule 71A of the Federal Rules of Civil Procedure. Ordinarily any part may have a jury trial on demand, but the court, *not the condemning agency*, may decide in its discretion that the peculiar circumstances of the case require a determination by appointed commissioners.

As mentioned above, the remainder of the cases which the majority cites for the proposition that a condemning agency may select one or another of several legislatively created procedures, do not involve trial with or without a jury. More significantly, these cases concern a choice of procedures which by its nature could not involve a question of equal protection. *Union School District* v. *Starr Commonwealth For Boys*, 322 Mich. 165, 33 N. W. 2d 807 (1948) is typical. There the condemning agency was taking land for the erection of a school. Under one state statute, the agency was required first to negotiate with the condemnee before initiating condemnation proceedings. Under another statute negotiations prior to taking were unnecessary. The school district chose to proceed under the latter statute; and the Michigan Supreme Court held that the choice of procedure did not violate the condemnee's constitutional rights. As the majority here notes, the State or its agencies alone institute condemnation proceedings; the condemnee, except in rare instances, cannot. The right to take land by eminent domain *as distinct from determination of compensation* is so fundamental an attribute of sovereignty that

given an admitted public use, on hearing need be afforded a condemnee. It therefore seems to me that a condemnee cannot claim denial of equal protection because the condemning agency is afforded a choice of procedures for the taking. But that is not the issue here.

The majority has enunciated its adherence to a principle which should be dispositive of the case before us: It says:

> "It is obvious in this instance that the proceeding prescribed for arriving at just compensation under the eminent domain act or under the airport terminal act is sufficient unto itself as a due process mechanism. Each one is designed to produce and is capable of producing a just result. No one suggests to the contrary. *If there were inequality within the framework of either procedure*, for example, if the Authority were given and the property owner were denied a right of appeal, (citations omitted) or the right to introduce evidence of comparable sales, or offers to sell or purchase (citation omitted), in one mode of procedure which the condemnor had the option to select and did select in the particular case, *a deprivation of equal protection of law would exist.*" (Italics supplied.

The majority expressly says that a statute giving a condemning agency an unilateral right of appeal from a compensation award would be unconstitutional. The ultimate purpose of such an agency in appealing from an award is to achieve a redetermination of the compensation at a lower amount. Similarly, realistically viewed, it seems to me the Authority will exercise its option under *N.J.S.A.* 32:1-132 to elect that tribunal (judge or jury) which the Authority thinks will award a lower amount. In condemnation proceedings, therefore, where the only issue in dispute, as here, is the amount of compensation, an unilateral right to trial by jury is no less offensive than a unilateral right of appeal.

Applying logically to the facts of the present case the majority's principle that an unilateral option within the framework of a statutory procedure would be invalid, I take it that if *N.J.S.A.* 32:1-132, without reference to the Eminent Domain or Airport Terminal Acts, gave the Authority power to condemn land for approaches to bridges and tunnels *and* provided that the Authority *alone* might choose to have a judge or jury determine just compensation, the statute would be unconstitutional. It seems to me highly artificial to make a condemnee's rights under the equal protection clause depend on whether the Authority's option derives from the self-contained provisions of a single statute or from the incorporation by reference of procedures in two distinct statutes. In either case, the result and the effect upon the condemnee are the same. What the court said in *In re City of Rochester*, 224 N. Y. 386, 121 N. E. 102 (1918), cited with approval by the majority, is particularly applicable to the present case:

> "'In the courts, parties similarly situated are entitled to equal rights and privileges. The Constitution forbids discrimination between them.'" *Id.* 224 N. Y. at 397, 121 N. E. 105.

The concept of fair play is the heart of equal protection; and it seems to me that fair play requires that the same officialy prescribed advantage and disandvantages should be enjoyed or suffered by both parties to a law suit. I would therefore hold that *N.J.S.A.* 32:1-132, insofar as it affords to The Port of New York Authority alone the right to choose whether compensation for condemned property will be tried by jury is unconstitutional as a denial of the condemnee's right to equal protection of the law. Accordingly, I would reverse the judgment below. I am authorized to say that Mr. Justice Schettino joins in this dissent.

Appendix C

Per Curiam Opinion of the Supreme Court of New Jersey (No. A-82, September Term—1960)

(Filed—January 23, 1961)

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

OTTO K. BAUMANN, *et al.*,

Defendants,

and

ELM LAND CO., INC.,

Defendant-Appellant.

Submitted December 21, 1960. Decided January 23, 1961.

MR. RUSSELL E. WATSON for plaintiff-respondent, The Port of New York Authority.
(MR. ROBERT S. TOBIN, of counsel.)

MR. NELSON G. GROSS for defendant-appellant, Elm Land Co., Inc.
(MESSRS. GROSS AND GROSS, attorneys.)

PER CURIAM.

The issues in this appeal, which was certified on our own motion prior to argument in the Appellate Division, are the same as those presented in *The Port of New York Authority v. Heming and Cervieri*, —— N. J. —— (filed today). The parties having agreed that the determination in that case would be controlling, and our opinion affirming the judgment therein having been filed, the judgment herein is accordingly affirmed.

Appendix D

Mandate on Affirmance of Supreme Court of New Jersey

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

MARYVONNE H. HEMING, JR., *et al.*,

Defendants,

and

ELIZABETH M. CERVIERI AND JOHN A. CERVIERI,

Defendants-Appellants.

This cause having been duly argued before this Court by Mr. Nelson G. Gross, counsel for the appellants and Mr. Russell E. Watson, counsel for the respondent, and the Court having considered the same,

It is hereupon ordered and adjudged that the judgment of the said Superior Court—Law Division is affirmed with costs; and it is further ordered that this mandate shall issue ten days hereafter, unless an application for rehearing shall have been granted or is pending, or unless otherwise ordered by this Court, and that the record be remitted to the Superior Court—Law Division to be there proceeded with in accordance with the rules and practice relating to that court, consistent with the opinion of this Court.

Appendix B

Witness the Honorable Joseph Weintraub, Chief Justice, at Trenton on the twenty-third day of January, 1961.

Filed
Jan. 23, 1961

John H. Gildea
Clerk

John H. Gildea
Clerk
Clerk of the Supreme Court

Appendix E

Mandate on Affirmance of Supreme Court of New Jersey

THE PORT OF NEW YORK AUTHORITY,

Plaintiff-Respondent,

vs.

OTTO K. BAUMANN, *et al.*,

Defendants,

and

ELM LAND CO., INC.,

Defendant-Appellant.

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Appendix E

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FILED
Jan. 23, 1961

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